Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
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	)	

COMMENTS OF

Z-TEL COMMUNICATIONS, INC.

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SUMMARY

The Notice of Proposed Rulemaking in this proceeding poses a comprehensive and broad array of issues that are central to operation of the United States telecommunications infrastructure.

However, the proposals in the NPRM are incomplete. Most importantly, despite its attempt to survey the "broad universe" of different intercarrier compensation practices, the NPRM fails to analyze the most significant and fastest-growing area of intercarrier payments – the Commission's unbundled local switching rate structure rule in 47 CFR 51.509(b).

In these Comments, Z-Tel Communications, Inc. ("Z-Tel") urges the Commission to modify this rule to prohibit ILECs from imposing usage-based, per-minute charges on unbundled local switching. Entry by means of unbundled local switching is growing, and the Commission has repeatedly recognized that in the sale of UNEs, ILECs have the ability and incentive to raise the cost of entry to CLECs. Because the Commission's UNE rate structure rules permit ILECs to charge traffic-sensitive, per-minute rates for unbundled switching, Z-Tel pays these per-minute charges to ILECs for virtually *all* of its traffic, whether local or interstate, originating or terminating. For this proceeding to create a truly "unified regime", the Commission cannot ignore the impact these per-minute charges will have on its analysis of bill-and-keep proposals.

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COMMENTS OF Z-TEL COMMUNCATIONS, INC.

The Notice of Proposed Rulemaking in this proceeding poses a comprehensive and broad array of issues that are central to operation of the United States telecommunications infrastructure. The goal of the Commission is certainly laudable – to create a "unified regime for the flows of payments among telecommunications carriers that result from the interconnection of telecommunications networks under current systems of regulation."[1] It is certainly in the public interest for the Commission periodically to revisit its access and reciprocal compensation rules with an eye towards simplicity and consistency.

However, the NPRM in this proceeding is simultaneously overbroad and incomplete. The NPRM proceeds with proposals for regulating the rates of a host of competitive carriers without first addressing the market power analysis it must undertake to proceed. More importantly, despite its attempt to survey the "broad universe"[2] of different intercarrier compensation practices, the NPRM fails to analyze the most significant and fastest-growing area of intercarrier payments – the Commission's unbundled local switching rate structure rule in 47 CFR 51.509(b).

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1 In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, FCC 01-132 (rel. Apr. 27, 2001) ("NPRM") at para. 1.

2 *Id.* at para. 2.

In these Comments, Z-Tel Communications, Inc. ("Z-Tel") urges the Commission to consider these issues. Z-Tel is among the nation's largest, independent providers of competitive residential local service in the country, with over 300,000 residential subscribers in 34 states. Z-Tel has been able to achieve this level of success, despite the tumultuous regulatory and capital market environment of the past few years, through the UNE Platform. Any truly "unified" regime and migration to bill-and-keep must simultaneously modify the Commission's UNE rate structure rules, which permit ILECs with market power to charge usage-based, per-minute rates to UNE Platform carriers.

Intercarrier compensation is not particle physics. Despite decades of searching, physicists still yearn for a unified theory that will reconcile Einstein's relativity theory with quantum mechanics. With regard to intercarrier compensation, the Commission's search has only begun. Unlike scientists, though, the Commission cannot test its theories in a laboratory – changes to the intercarrier compensation regime can only be implemented in real markets with real carriers and real customers. Accordingly, Z-Tel encourages the Commission to examine all issues – including usage-based UNE prices – before initiating any migration to a "unified", bill-and-keep regime.

I. THE COMMISSION MUST REFORM ITS RULES THAT PERMIT ILECS TO CHARGE USAGE-BASED PRICES FOR UNBUNDLED NETWORK ELEMENTS

The fastest-growing intercarrier compensation issue facing the industry today is the charges CLECs pay ILECs for access to unbundled network elements. In particular, despite the Commission's statement that a "minute is a minute", the Commission's rules that permit per-minute costs for UNEs (47 C.F.R. 51.507, 51.509) are not addressed by the NPRM. Z-Tel strongly believes that this proceeding must expanded to include a re-examination of those rules –

particularly for unbundled local switching, which permits ILECs to charge per-minute charges for certain components. Permitting ILECs to collect these per-minute fees while the Commission migrates to a combination of flat rates or bill-and-keep for other intercarrier payments could lead to inefficient, irrational and anticompetitive results.

A. CLEC Section 251(c)(3) Payments Are Large and Growing

For Z-Tel, and many CLECs, the *largest* component in the Cost of Goods Sold are unbundled network element rates. As described above, Z-Tel is one of the largest CLECs in the country, utilizing the UNE Platform to provide service to over 300,000 residential local subscribers in 34 states. For virtually *each minute* that *every one* of these subscribers spends on the telephone, Z-Tel purchases unbundled local switching from the local incumbent LEC, at rates determined pursuant to the Section 251-252 process.

Entry by means of unbundled network elements is growing quickly.[3] In the two states where the UNE Platform has been implemented for the longest period of time – New York and Texas – competitors like Z-Tel have been able to role out new and innovative services to the benefit of consumers. Commission statistics demonstrate that in those two states, the percentage of "residential and small business" consumers served by competitors is greater than 50% -- considerably higher than most other states.[4] In fact, that Commission's Local Competition Report shows that the competitive gap between states with considerable UNE Platform entry and other jurisdictions is widening: 20% of *all* CLEC entry nationwide in 2000 was in New York, and 34% of all CLEC entry in the second half of 2000 occurred in Texas and New York, while

3 *See* FCC, Common Carrier Bureau, Industry Analysis Division, *Local Telephone Competition: Status as of December 31, 2000*, Tables 3, 4 (rel. May 2001) ("FCC Local Telephone Competition Report") (reporting that CLEC growth by *via* unbundling grew 62% in the second half of 2000, more than twice as fast as total CLEC line growth in the same period).

4 *See* Local Competition Report at Table 8.

those states accounted for only 25% of CLEC lines nationwide. Clearly, states that have implemented the UNE Platform faithfully have seen considerably more competitive entry than other states.

Because entry by means of unbundled network elements is growing faster than any other type of competitive entry, the Commission must address the structure and level of Section 251(c)(3) payments in this proceeding. If the Commission does not, it could be in the position of prohibiting CLECs from recovering their costs on a per-minute basis but will affirmatively permit ILECs to impose per-minute costs on those same CLECs. It is an axiomatic ratemaking principle insists that costs ought to be recovered in the nature in which they are incurred.

The components of the UNE Platform are priced pursuant to the Commission's TELRIC and rate structure rules. With particular regard to unbundled local switching, Commission Rule 51.509(b) states that ILECs may charge "a combination of a flat-rated charge for line ports and one or more flat-rated or per-minute usage charges for the switching matrix and for trunk ports." As a result, although flat-rated charges for all components of unbundled local switching are clearly consistent with TELRIC and the Commission's rate structure, incumbent LECs have seized upon the Commission's permission to implement "per-minute usage charges."[5] Indeed, the ILECs that have vociferously argued for bill-and-keep for some forms of traffic have proposed, argued, and lobbied for per-minute rates for unbundled local switching.[6]

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5 Z-Tel is aware of only one state – Illinois – that does not permit the ILEC to charge a per-minute rate for unbundled local switching. Some ILECs have tacked on other usage charges on unbundled local switching as well – Pacific Bell, for instance, assesses a call set-up charge of $0.001 in California. This call set-up charge is inconsistent with 47 CFR 51.509(b), which only permits "per-minute usage charges for the switching matrix and for trunk ports."

6 Other Commission UNE rate-structure rules are also inconsistent with a migration to bill-and-keep. For instance, Rule 51.507(e) permits, in certain circumstances, ILECs to recover nonrecurring charges through "recurring charges over a reasonable period of time." 47 C.F.R. 51.507(e).

Changing the UNE rate structure rules to eliminate the usage component of unbundled local switching would be necessary for the Commission to fully achieve the goals of a bill-and-keep regime for local traffic. Indeed, if the Commission does not properly reform the per-minute component of its UNE rate structure rules and decides to mandate bill-and-keep, UNE Platform carriers could be placed in a precarious situation. Such carriers would be required to pay per-minute charges to the ILEC for end-office switching while they would potentially be precluded from collecting any usage charge for terminating traffic.

In addition, if there are efficiency benefits from any of the Commission's bill-and-keep proposals, UNE Platform carriers will be effectively denied those efficiencies if the Commission treats their "minutes" differently and require them to pay per-minute charges to the ILEC. Indeed, if the Commission's goal is to "unify" all of its compensation rules, it must unify *all* of those rules – including usage-sensitive component of unbundled local switching.

B. Per-Minute 251(c)(3) Payments Must be Addressed if the Commission Addresses 201(b) Access Charges and 251(b)(5) Reciprocal Compensation Payments

In the *First Local Competition Order*, the Commission stated that unbundled local switching was "closely analogous" to certain interstate switched access services.[7] As a result, the Commission directly imposed a surcharge on the rate for unbundled local switching equivalent to the carrier common line charge and the equivalent of 75% of the transport interconnection charge (TIC) and permitted states to impose certain intrastate access surcharges for several months.[8] Of course, while many components of that 1996-era access charge structure

[7] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order,* FCC 96-325 (rel. Aug. 8, 1996) ("*First Local Competition Order*") (subsequent history omitted) at para. 721.

[8] 47 CFR 51.515(b)-(c) (surcharges expired on June 30, 1997, at the latest): *First Local Competition Order* at paras. 716-32.

have been altered or eliminated, the Commission has yet to reassess the manner in which it permits ILECs to charge for unbundled local switching. As a result, given the past linkage of unbundled local switching and access, to exclude an examination of unbundled local switching rate structure from this proceeding would be arbitrary and would violate the Administrative Procedures Act.

In summary, if the Commission wants to treat every "minute as a minute", it must also address and eliminate the per-minute component of unbundled local switching rates. As discussed above, requiring UNE Platform CLECs to continue to pay per-minute Section 251(c)(3) charges to ILECs in an otherwise bill-and-keep environment would unduly deny those CLECs and their customers the ostensible efficiency and competitive benefits of that environment. Per-minute switching charges comprise a significant component of Z-Tel's cost structure – indeed, Z-Tel tailors its market entry and marketing strategy on the basis of unbundled switching rates.[9] As a result, Z-Tel urges the Commission to expand this "unified" proceeding and proposes that the Commission modify Commission Rule 51.509(b) to require that ILECs recover unbundled local switching costs only through flat-rated charges.

II. THE COMMISSION'S RELIANCE UPON A "TERMINATING ACCESS MONOPOLY" IS MISPLACED WITH REGARD TO CLECS

Since adopting the *Competitive Carrier* paradigm in a series of orders beginning in 1980, the Commission has consistently refrained from regulating the interstate rates of "nondominant" common carriers. Under the Commission's Rules, a dominant carrier is defined as "…a carrier found by the Commission to have market power."[10] The process of determining whether a

[9] For example, in California, which has among the highest unbundled switching costs in the country, Z-Tel has refrained from active marketing, even though market reception to Z-Tel services in the state has been successful.

[10] 47 C.F.R. section 61.3(o).

particular carrier or class of carriers possesses market power is fact-intensive and requires a detailed economic analysis of the relevant markets and the facilities owned or controlled by the carrier or class of carriers in questions, the services provided, and the customers of the carriers.

The NPRM does not engage in this analysis. Instead, the NPRM assumes – without discussion – that a "terminating access monopoly" problem exists for all LECs, including CLECs.[11] Indeed, from the plain observation that because "an end user typically subscribes to only one LEC," the Commission concludes that there is therefore a "terminating access monopoly" problem that warrants regulating the terminating access rates of all LECs. This decision and approach is not consistent with the facts.

In fact, one could utilize the Commission's logic to decide instead that that there is an "originating traffic monopoly" problem. To wit, one could say: "An end user typically subscribes to only one interexchange carrier. Hence, LECs seeking to have its customers receive calls from a subscriber to that interexchange carrier have no choice but to terminate IXC traffic that originated from the calling party's IXC. These LECs generally have little practical means of affecting the calling party's choice of IXC."[12]

Competitive local carriers are often obligated by market forces to terminate traffic received by carriers that may not pay for that access. Good customer service dictates that when a subscriber has a phone, that subscriber expects that calls from around the country and indeed around the world will come through. Because they have not been granted a large market share by six decades of state-sanctioned and protected status, CLECs in particular must address and

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[11] NPRM at paras. 13-15.

[12] *Contra* NPRM at para. 13 ("[A]n end user typically subscribes to only one LEC. Hence, other carriers seeking to deliver calls to that end user have no choice but to purchase terminating access from the called party's LEC. These originating carriers generally have little practical means of affecting the called party's choice of access provider.")

even exceed this market expectation. In the *CLEC Access Charge Order*, the Commission clearly stated that "the public has come to value and expect the ubiquity of the nation's telecommunications network."[13] If a CLEC's service does not provide its customers the "ubiquity" that those customers "value", those customers are not apt to stay long with that CLECs. As a result, CLECs often have little recourse but to terminate traffic delivered to them by other carriers – lest they lose any chance of breaking into the market.

For example, one notable IXC – AT&T – has in the past initiated a policy of "self-help" of refusing to make *any* payment for terminating access to CLECs that the IXC determined on its own accord were "too high". Yet, those CLECs *continued to terminate* the calls – without compensation – that this IXC delivered to their local networks. A core reason those CLECs (Z-Tel included) decided to continue to terminate this IXCs traffic was because the alternative – blocking calls from this IXC – would cause those CLECs to lose customers.[14] If "market power" is defined as the ability of a firm to set price, consider that in this instance, this IXC was able to acquire, via unilateral decision, terminating access *for free* for months on end. Yet the NPRM brands the local CLECs as a "monopoly."

In the end, there is no single "terminating access monopoly problem." Whatever power LECs may have regarding terminating access may be counterbalanced and outweighed by the market and regulatory need to terminate calls regardless of the payment status of the originating

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13 In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, CC Docket No. 96-262, *Seventh Report and Order and Further Notice of Proposed Rulemaking*, FCC 01-146 (rel. Apr. 27, 2001) at para. 93.

14 AT&T remains the nation's largest long-distance company. Who would subscribe to a CLEC service if they would no longer receive calls from millions of AT&T long-distance customers? Particularly if one of those AT&T long-distance customers was your mother?

carrier.[15] The problem is particularly acute for CLECs because a company seeking to grow its market share must provide its local customers the ability to receive calls from potential callers, even if those callers are customers of a non-paying originating carrier.

For most interstate calls, there is a *series* of carrier-customer relationships, and each carrier has very little (if any) influence over those relationships. In each of those customer/carrier relationships, the carrier could be said to "control" the customer's traffic. There is no legitimate reason to single-out one such relationship (the called party/LEC relationship) for special, "monopoly" designation.

There is no shortage of market power issues in the telecom industry. Z-Tel urges the Commission to focus its efforts on the immense market power wielded by dominant, incumbent LECs with regard to the provision of wholesale, unbundled network elements and services. Eliminating the ability of these dominant, ILECs to charge usage-based unbundled switching rates, as suggested by Z-Tel in Section I above, would go a long way towards fostering vibrantly competitive local markets.

III. CONCLUSION

In conclusion, while the NPRM raises interesting and insightful issues, the proposals remain incomplete. Most importantly, the NPRM fails to address the most significant and growing area of intercarrier payments – the payments made by CLECs to ILECs for UNEs under the Commission's Section 251(c)(3) rules. Z-Tel strongly urges the Commission to examine its UNE rate structure rules as part of this "unified" review and asks the Commission to revise Rule

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15 Z-Tel strongly cautions against the Commission from labeling the term "monopoly" in this context on all carriers. The inquiry as to whether a company has market power should *not* focus upon whether a carrier controls access to any one particular customer, but upon whether a carrier controls a sufficient number of customer relationships that it can then adversely affect the market as a whole. In the case of incumbent LECs, who control access to well over 95% of the nation's access lines, the answer is clearly yes.

51.509(b) to prohibit ILECs from imposing usage-based, per-minute charges on unbundled local switching.

Entry by means of unbundled local switching is growing, and the Commission has repeatedly recognized that in the sale of UNEs, ILECs have the ability and incentive to raise the cost of entry to CLECs. Because the Commission's UNE rate structure rules permit ILECs to charge traffic-sensitive, per-minute rates for unbundled switching, Z-Tel pays these per-minute charges to ILECs for virtually *all* of its traffic, whether local or interstate, originating or terminating. In creating a truly "unified regime", the Commission must address the impact these per-minute charges would have on the various bill-and-keep proposals.

Respectfully submitted,

S/submitted electronically

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